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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1383

RICHARD A. GANT, *et al.*,
Petitioners,

v.

UNION BANK, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF INTERNATIONAL BUSINESS MACHINES CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF OF AMICUS CURIAE

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MOTION OF INTERNATIONAL BUSINESS MACHINES CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

International Business Machines Corporation ("IBM") respectfully moves the Court for leave to file the attached brief as amicus curiae supporting the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Counsel for the petitioners has consented to the filing of the at-

tached brief. IBM was unable to obtain consent from counsel for the respondents.

The interest of IBM as an amicus is set forth at pages 2-3 of the attached brief. The brief discusses the adverse practical effects of the decision sought to be reviewed, its historical errors concerning the Seventh Amendment, and its misplaced concern over the ability of courts to develop appropriate standards for identifying those extraordinarily complex cases for which jury trials are unsuitable. These are matters that the petitioner does not fully present and that further demonstrate the importance of the question raised by the petition.

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BRIEF OF AMICUS CURIAE INTERNATIONAL BUSINESS MACHINES CORPORATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

International Business Machines Corporation ("IBM") submits this brief as amicus curiae in support of the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit. That decision is reprinted in the appendices to the petition and is reported at 609 F.2d 411.

INTEREST OF AMICUS CURIAE

Petitioner seeks a writ of certiorari from this Court to review a decision of the United States Court of Appeals for the Ninth Circuit. *In re U.S. Financial Securities Litigation*, 609 F.2d 411 (9th Cir. Dec. 10, 1979). In *U.S. Financial*, the Ninth Circuit decided that a federal district court has no authority to strike a jury demand in an extraordinarily complex civil case, even though the court has concluded that a jury would be incapable of understanding and deciding rationally the issues in the case. In reaching this result, the Ninth Circuit asserted that no "case is so overwhelmingly complex that it is beyond the abilities of a jury." *Id.* at 432.

IBM, a manufacturer of electronic data processing equipment, is a party to a number of extraordinarily complex civil cases pending in the Ninth Circuit.[1] In *Greyhound Computer Corp. v. IBM Corp.*, IBM moved to strike the plaintiff's jury demand on the ground that the case was so complex that a jury would be unable to understand and decide it. On November 6, 1979, the trial judge denied the motion "for lack of authority" but certified his decision for interlocutory review under 28 U.S.C. § 1292(b). On February 1, 1980, the Ninth Circuit denied permission to appeal because "[t]he issue of law raised by the petition has been definitively resolved in this circuit" by the *U.S. Financial* decision. Accordingly, IBM has an interest in this Court's review of *U.S. Financial*.[2]

[1] *E.g., Memorex Corp. v. IBM Corp.*, Nos. 78-3050, 78-3236 (9th Cir., docketed Sept. 12 and Oct. 6, 1978), *appealing ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978) (*"Memorex"*); *Greyhound Computer Corp. v. IBM Corp.*, No. Civ. 72-242-PHX-WPC (D. Ariz., filed Oct. 20, 1969) (*"Greyhound"*).

REASONS FOR GRANTING THE WRIT

In squarely deciding for the first time at an appellate level that extraordinary complexity is not a basis for withholding a civil case from a jury, the court below committed error of far-reaching practical consequences for the administration of justice in the federal courts. As the complexity, number, and duration of protracted cases increase, courts will increasingly be burdened by the failures of juries to cope with them, and litigants will increasingly be deprived of accurate, reliable adjudications. The result reached below is, moreover, inconsistent with the lessons of history and the teachings of this Court. It should be repudiated promptly.

I. THE DECISION IN *U.S. FINANCIAL* HAS FAR-REACHING, ADVERSE IMPLICATIONS FOR THE ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS.

The Ninth Circuit's failure to recognize that no jury trial right exists in cases exceeding the practical abilities and limitations of a jury will have far-reaching adverse implications for the administration of justice. Trying extraordinarily complex cases to a jury is inconsistent with the requirements of due process, places enormous unnecessary burdens on the

[2] Concurrently with the filing of this amicus brief, IBM is also petitioning for a writ of certiorari to review the Ninth Circuit's decision in *Greyhound*.

judicial system, and threatens to force fundamental alterations in jury trial procedure.

A. Trial to an Uncomprehending Jury Violates Due Process.

The constitutional requirement of due process is intended to ensure the use of adjudicatory procedures that will minimize the risk of an erroneous deprivation of a property interest. *See Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, —, 47 U.S.L.W. 4581, 4584 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). Decisional accuracy in adjudications can be reliably achieved, in accordance with the mandate of the Due Process Clause, only when decisions are based on an understanding of the evidence and the applicable law. When a jury is not capable of understanding the issues involved in a lawsuit, it is manifestly unsuited to perform the decisionmaking function.

IBM's experience in three extraordinarily complex cases tried in the Ninth Circuit—all of which resulted in hung juries on antitrust issues [3]—demonstrates the

[3] *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978), *appeal pending sub nom. Memorex Corp. v. IBM Corp.*, Nos. 78-3050, 78-3236 (9th Cir., docketed Sept. 12 and Oct. 6, 1978) ("*Memorex*") (89 trial days); *Transamerica Computer Co. v. IBM Corp.*, [1979-2] Trade Cas. ¶ 62,989 (N.D. Cal. Oct. 18, 1979), *appeal docketed*, No. 80-4048 (9th Cir. Jan. 31, 1980) (123 days); *Forro Precision, Inc. v. IBM Corp.*, Civ. No. 74-1653 (N.D. Cal. 1977), *appeals docketed*, Nos. 78-1455, 78-1755 (9th Cir. Mar. 1 and Apr. 7, 1978) (22 trial days).

In two other jury trial cases against IBM, the trial judges entered directed verdicts for IBM at the close of plaintiffs' cases. *See California Computer Prods., Inc. v. IBM Corp.*, [1979-1] Trade Cas. ¶ 62,713 (9th Cir. June 21, 1979) (58 trial days); *Greyhound Computer Corp. v. IBM Corp.*, [1972] Trade Cas. ¶ 74,205 (D. Ariz. 1972), *rev'd in part and remanded*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (25 trial days).

threat to due process in trying such cases to juries and the need to try them to judges instead. One of those cases, *Memorex*, provided an especially instructive glimpse into a jury's inability to decide such cases. After the jurors were unable to reach a decision, the judge questioned them about the case. The responses of the jurors show how baffled they were by the *Memorex* case and, no doubt, how confused the other juries were as well.[4] Comparing the jurors' bewildered responses, set forth in Appendix A hereto, with the reasoned opinions of the trial judges in *Transamerica* and *Memorex*, one can have no doubt that bench trial is superior to jury trial in an extraordinarily complex case.

In extraordinarily complex cases judges can meet the demands of due process, though juries cannot, because judges have many procedures and resources available to them that are unavailable to juries. Besides the immense advantage of their legal training and experience in dealing with complicated factual issues, judges can utilize many practical aids that are not available to a jury. For example, judges can review daily transcripts, admit depositions into evidence instead of having portions read aloud, call

[4] Appendix A to this brief describes the *Memorex* case more fully and details the jurors' failure to understand the case.

or recall and question witnesses, and request supplemental briefs and arguments during or after the trial.[5] They can call for proposed findings of fact and conclusions of law from counsel for the parties.[6] Judges can take the time to understand and decide a complex case without the pressure to return to their normal job or way of life. They can read, reflect, and learn in a way that a jury cannot and was never intended to do.[7] Finally, judges in complex cases proceed through the disciplining exercise of producing written findings of fact and conclusions of law,[8] which a higher court can review for consistency and accuracy.

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[5] *See In re Boise Cascade Securities Litigation*, 420 F. Supp. 99, 104-05 (W.D. Wash. 1976); Harris & Liberman, *Can the Jury Survive the Complex Antitrust Case?*, 24 N.Y.L. Sch. L. Rev. 611, 622 n.52, 623 (1979); Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 Harv. L. Rev. 898, 917 (1979).

[6] *See Nyyssonen v. Bendix Corp.*, 342 F.2d 531, 532-33 (1st Cir.), *cert. denied*, 382 U.S. 847 (1965).

[7] One does not "demean[ ] the intelligence of the citizens of this Nation," *In re U.S. Financial Securities Litigation*, 609 F.2d at 430, by pointing out that prevailing jury trial procedures prevent jurors from acquiring the understanding of extraordinarily complex factual and legal material necessary for rational decisionmaking. Research undertaken in the field of cognitive psychology has indicated that an individual will be severely disabled from comprehending materials if, as under prevailing jury practice, the person supposedly gaining an understanding of the material is deprived of active interplay in the learning process. *See, e.g.*, N. Gage & D. Berliner, *Education Psychology* 151 (1975); McLeish, *The Lecture Method*, in *The Psychology of Teaching Methods* 252-301 (W. Van Til ed. 1976).

[8] *See* Fed. R. Civ. P. 52(a).

B. Trying Extraordinarily Complex Cases to a Jury Places Enormous and Unnecessary Burdens on the Judicial System.

The Ninth Circuit's decision in *U.S. Financial*, allowing a litigant to insist upon a jury trial without regard to the complexity of the case, its length, or how many times it must be retried, imposes enormous burdens on the courts, on jurors, and on the opposing parties. As the number and duration of protracted cases has increased, so have these burdens. In 1970, 32 federal civil trials lasting 20 days or more required a total of 1,017 trial days; by 1979, the number of cases requiring 20 or more days to try had grown to 57, and the total number of trial days involved was 1,972.[9]

The submission of an extraordinarily complex case to a jury that in all likelihood will be too confused to reach a decision is a futile act that needlessly magnifies the burdens that complex litigation imposes on the courts and litigants. Judge Conti made just this point after the *Memorex* jury hung:

> The trial of this case occupied the time of the court and its staff almost exclusively for seven months. Because of the estimated length of the trial, the court went off the new case assignment wheel for its duration, thereby increasing the workload of other courts and personnel of the Northern District. In addition, the jury expenses (borne by the government in this case) amounted to more than $32,000. All of this time and expense went for naught when the court was forced to declare a mistrial.

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[9] Administrative Office of the U.S. Courts, *Report of the Director*, Tables C-8, C-9 (1970, 1979).

> *When a trial is by jury rather than to the court, there is the possibility that no decision will be made.*

Memorex, 458 F. Supp. at 448 (emphasis added).[10] Similarly, when trial is to a jury and the judge commits reversible error in an instruction or in an evidentiary decision (the likelihood of which increases with the length and complexity of the trial[11]), the trial goes for naught, requiring another costly and protracted trial.[12]

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[10] In the course of the three IBM cases in which the juries hung, 230 trial days were consumed.

[11] Recently, one district court judge, facing a year-long trial of a complex antitrust case, candidly observed, "[there is] no way I can avoid making error on this case." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, Civ. A. No. 74-2451, at 21 (E.D. Pa. July 11, 1979) (transcript of pretrial hearing).

[12] Thus, at the end of a recent antitrust jury trial lasting some fourteen months, one district judge made the following request:

> If the Court of Appeals should conclude that any issue of fact necessary for decision of any issue of law in this case was submitted to the jury under a prejudicially incorrect legal standard or was otherwise improperly determined, it is respectfully suggested that the Court consider the appropriateness of subsequent district court fact-finding on such issue, without a jury, either on the present record, or with such additions or deletions as the Court of Appeals may order in light of its consideration of evidentiary rulings.

SCM Corp. v. Xerox Corp., 463 F. Supp. 983, 1021 n.53 (D. Conn. 1978), *remanded on other grounds*, 599 F.2d 32 (2d Cir. 1979). *See also Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 268, 305 (2d Cir. 1979), *cert. denied*, 48

The effect on the jurors themselves of being asked to spend months listening to evidence, and then deciding these extraordinarily complex cases, is a further consideration that the courts should not overlook. The jury system is often seen as a contribution to the legitimacy of courts and a way to enhance the public's sense of participation in the legal system. When, however, jurors are required to undertake the serious public duty of resolving a major dispute that, as it turns out, they cannot adequately comprehend, jury service becomes a traumatic experience that can only heighten the distrust and anxiety that lay people have about the judicial process. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 465-69 (1978) (in a complex and protracted criminal antitrust case, jury foreman reported to the judge that the deadlocked jurors were "distraught" and that one juror threatened "to jump out the window").

C. Extraordinarily Complex Cases Are Forcing Fundamental Alterations in the Institution of the Civil Jury.

The *U.S. Financial* decision deprives district courts of authority to withhold an extraordinarily complex case from a jury. Trial judges, in an effort to preserve due process and to protect the orderly dispatch of judicial business, will naturally experiment with novel modifications of traditional jury trial procedure in an attempt to make extraordinarily complex cases more manageable and more comprehensible to jurors.

U.S.L.W. 3517 (Feb. 19, 1980) (in a jury case of "daunting complexity," the reviewing court repeatedly urged that "where we have directed a new trial, we hope the parties will find another means of disposition").

In *Memorex*, for example, the judge permitted the parties to deliver an introductory lecture on computers to the jurors; instructed the jury on the law before the trial; permitted the jurors to take notes; and placed the transcripts, exhibits and final argument, which was annotated to the evidence, in the jury room. Similarly, in *Transamerica* the judge instructed the jury on the law before trial, permitted the jurors to take notes, and permitted the jurors during the trial to write out questions they had, which were then given to the lawyers for such response as they deemed appropriate. As mentioned, in both cases the juries were still baffled and unable to reach a decision.

In the recently-commenced MCI-AT&T antitrust trial, Judge Grady is experimenting with several other innovations. He has restricted, to a total of a little over 100 trial days, the amount of time available for presentation of plaintiff's and defendant's direct evidence and for cross-examination. *MCI Communications Corp. v. AT&T Co.*, No. 74 C 633 (N.D. Ill. Nov. 28, 1979) (pretrial order). The trial will go forward in stages, one month at a time, recessing periodically to permit the jurors to return to their normal lives for awhile and to permit the judge to try other cases.[13] *Id.* First reports on the jurors'

[13] Whether such recesses are consistent with due process is questionable. In *Citron v. Aro Corp.*, 377 F.2d 750 (3d Cir.), *cert. denied*, 389 U.S. 973 (1967), the court reversed and remanded a case for a new trial because several recesses during the trial, including one of two weeks between plaintiff's and defendant's cases, created the possibility that the jury was unable adequately to remember plaintiff's case.

comprehension of this complex antitrust case are as discouraging as one might expect: "After three weeks of hearing testimony, they look tired and confused." Blum, *AT&T Jurors Find a Little Knowledge Is a Difficult Thing*, Wall St. J., Feb. 26, 1980, at 18, col. 3 (Eastern ed.). This article, which describes the complexity of the MCI-AT&T litigation and the jurors' initial reactions to the case, is reprinted as Appendix B to this brief.

As judges modify traditional jury trial procedures in an attempt to assist jurors in understanding extraordinarily complex cases, the jury increasingly loses its resemblance to the decisionmaking body envisioned by the Seventh Amendment. We are seeing something new as we observe juries with volumes of evidence, annotated closing arguments, notebooks, periodic instructions on the law, and lengthy recesses in the course of a trial lasting many months. The traditional Seventh Amendment jury was a body of citizens who sat continuously from the beginning of trial to the end, listened only to the evidence presented by the parties, and then, applying the law in light of their common sense and experience in the practical affairs of life, reached a swift, unanimous decision.

Attempts to convert the traditional Seventh Amendment jury into a kind of ongoing committee of inquiry, a novel *ad hoc* administrative agency, are a necessary consequence of the view that courts are without authority to order bench trial of extraordinarily complex cases. This inevitable result of the *U.S. Financial* decision should be borne in mind by the Court in deciding whether to grant review of the decision below.

II. FROM THE TIME THE SEVENTH AMENDMENT WAS ADOPTED UNTIL THE DECISION IN *U.S. FINANCIAL*, THE PRACTICAL ABILITIES AND LIMITATIONS OF JURIES HAVE BEEN A CONSIDERATION IN DETERMINING WHETHER A CASE IS TRIABLE AS OF RIGHT TO A JURY.

In *U.S. Financial*, the Ninth Circuit refused to consider the practical abilities and limitations of juries as a factor in deciding whether the Seventh Amendment requires an extraordinarily complex case to be tried to a jury. It concluded that consideration of jury capabilities would be contrary to the intent of the Framers of the Seventh Amendment and "a radical departure" from prior interpretations of that constitutional provision. *In re U.S. Financial Securities Litigation*, 609 F.2d at 425. To the contrary, the "radical departure" from Seventh Amendment jurisprudence is the Ninth Circuit's directive that trial courts may not consider the ability of a jury to understand and decide a case accurately.

The Framers of the Seventh Amendment, in prefacing that provision with the words "In Suits at common law," plainly did not intend to extend the use of juries to proceedings in equity. *See, e.g., Parsons v. Bedford*, 28 U.S. (3 Pet.) 266, 275 (1830). Equally clear, from the legislative history of the Amendment and from early decisions construing it, *see, e.g., United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (Story, J.), is that the Framers intended to incorporate into the Amendment the distinction between suits at common law and proceedings in equity as that distinction was made in England in 1791.

The English practice in 1791 was to try complex cases in equity, without a jury, not at law with a

jury. Lord Devlin, a Lord of Appeal of England and a recognized authority on the use of the jury in English law, at the request of counsel for IBM, extensively researched the English disposition of extraordinarily complex cases at the time of the adoption of the Seventh Amendment.[14] He has demonstrated that the Chancellors of the period, who controlled the allocation of cases between the law courts and the court of equity, would not allow a case beyond the practical abilities and limitations of a jury to be tried in the law courts before a jury. Equity would take jurisdiction over such complex matters even though the action requested legal relief and was one typically heard in the law courts. The principle upon which the Chancellors acted is one that both English and American courts have used for centuries to determine the bounds of equity: Equity will take jurisdiction whenever the procedures of the law courts —including the procedure of jury trial—are inadequate to do justice in the case.

That principle retains its vitality in the federal courts today. This Court has consistently used the principle of inadequacy of legal procedures, specifically the adequacy or inadequacy of the jury trial procedure, in delineating the scope of the Seventh Amendment. Contrary to the ruling in *U.S. Financial*, the reference in *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970), to "the practical abilities and limitations of juries" was not "a radical departure" from

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[14] Lord Devlin's work, currently available as a privately published monograph, is titled "Note on the Suit at Common Law in England at the Time of the Seventh Amendment (1791)." Lord Devlin's Note has been accepted for publication in a forthcoming issue of the Columbia Law Review.

established Seventh Amendment practice. It was merely a formulation of well-established equitable doctrine consistently utilized by this Court in Seventh Amendment analysis. *See Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442, 454-61 (1977); *Katchen v. Landy*, 382 U.S. 323, 339 (1966); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478-79 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 507-11 (1959).

III. THOSE FEW CASES OF SUCH COMPLEXITY AS TO BE BEYOND THE PRACTICAL ABILITIES AND LIMITATIONS OF A JURY CAN BE IDENTIFIED.

The *U.S. Financial* court sought to justify its decision by raising doubts as to whether courts can "draw the line between those cases which are, and those which are not, too complex for a jury." 609 F.2d at 431. Deciding whether a case exceeds the practical abilities and limitations of a jury is, however, a practical task that judges readily can perform. The exercise will be quite similar to the balancing process mandated by this Court for determining whether a criminal defendant has been denied the right to a speedy trial. *See Barker v. Wingo*, 407 U.S. 514 (1972). There the Court, refusing to adopt rigid rules, told lower courts to decide each case "on an *ad hoc* basis," *id.* at 530, weighing four factors identified by the Court. *Id.* at 530-33.

In separating the extraordinarily complex cases from the merely complex, the first consideration should be the overall dimensions of the trial. The sheer size of a proceeding obviously affects a juror's ability to absorb, understand, and remember the evi-

dence presented at trial. A simple and useful indicator of the overall dimensions of a case is the anticipated length of the trial. Trials expected to take more than, say, one month necessarily raise a serious question as to whether they exceed the practical abilities and limitations of a jury.[15]

The second factor to be weighed by a court, in ruling on a motion to strike a jury on grounds of extraordinary complexity, is the nature of the evidence proposed to be introduced. The jury functions best when the jurors are apt to be familiar with the subject matter of the lawsuit and thus with the content of the evidence introduced. The intricacies of corporate financial decisions or accounting, for example, like the design and use of sophisticated data processing equipment, are subjects with which ordinary jurors are unlikely to be familiar. The anticipated number of witnesses with "scientific, technical, or other specialized knowledge," *see* Fed. R. Evid. 702, is a good indicator of the difficulty of the evidence proposed to be introduced at trial.

A third consideration is the conceptual difficulty of the law to be applied. Many antitrust cases, for example, require understanding and application of difficult legal standards with which jurors are wholly

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[15] Statistics collected by the Administrative Office of the U.S. Courts show that in 1977, 1978, and 1979, 29, 24 and 31 jury trials, respectively, lasted 20 days or more, less than 1% of all civil jury trials. For the same years, 17, 15 and 11 civil jury trials lasted 25 days or more. Of those civil jury trials lasting 25 days or more, slightly less than half were antitrust and securities cases. Administrative Office of the U.S. Courts, *Report of the Director*, Tables C-8, C-9 (1977-79).

unfamiliar. The antitrust laws incorporate concepts from economic analysis, such as market power or cross-elasticity of supply and demand, that exceed the grasp of ordinary citizens. The length and difficulty of the necessary jury instructions—which in extraordinarily complex cases sometimes run to a hundred pages or more—will be a good objective indication of the legal complexity.

Balancing the considerations set out above, trial judges can be expected to apply the *Ross* test to protect and harmonize both the parties' right to a jury trial in an ordinary legal action and their right to an accurate and reliable decisionmaking process in even the most complicated commercial litigation. The fears of the *U.S. Financial* majority that courts cannot "draw the line" are entirely unfounded.

CONCLUSION

IBM respectfully requests that the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

THE JURY IN *ILC PERIPHERALS LEASING CORP. v. IBM CORP. FAILED TO COMPREHEND THE* COMPLEX TECHNOLOGICAL, FINANCIAL, AND ECONOMIC ISSUES INVOLVED IN THAT CASE

Following a 96-day antitrust trial that investigated "the computer industry in the United States from 1964 through the mid-1970's," Memorex Br., p. 7,[1] the jury in *ILC Peripherals Leasing Corp. v. IBM Corp.*, could not decide the issues of monopolization and attempted monopolization presented by 19,000 pages of transcript, 2,300 exhibits, and 83 pages of jury instructions. After declaring a mistrial, the District Court gave further consideration to IBM's motion to strike Memorex's jury demand and ordered that, in the event of a retrial, the demand be struck. *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 448 (N.D. Cal. 1978). The court, based on its familiarity with the case and its observations during the trial, concluded that "the magnitude and complexity of the present lawsuit render it, as a whole, beyond the ability and competency of any jury to understand and decide rationally." *Id.*

Memorex's case against IBM was founded on a variety of complaints about IBM's development, pricing, and marketing, over a ten-year period, of modern electronic data processing systems and certain peripheral devices included within these systems. Memorex claimed IBM introduced new products "with no technological justification," Memorex Br., p. 17, lowered prices beyond "legitimate competitive price reductions," *id.* at 16, and an-

[1] Citations to "Memorex Br." are to Appellant's Opening Brief in *Memorex Corp. v. IBM Corp.*, Nos. 78-3050, 78-3236 (9th Cir., appeals docketed September 12 and October 6, 1978); citations to "Tr." are to the transcripts of the trial; citations to "CR" are to the Clerk's Record on Appeal.

nounced prematurely "the introduction of new technology" so as to "freeze entire markets at the critical stages of development and marketing." *Id.* at 18. As the district court observed, "[r]esolution of these issues required an understanding of a vast amount of advanced computer technology and sophisticated financial principles." 458 F. Supp. at 444.

Besides being asked to grapple with technological and financial complexities, discussed during the course of the trial by no fewer than 17 experts, the jury was also supposed to define areas of competition and assess the competitive effect of IBM's and Memorex's conduct by applying abstruse economic "concepts like cross-elasticity of supply and demand, market share and market power, . . . [and] barriers to entry." *Id.* at 448. The use of such economic principles for the purpose of making judgments about the competitive effect of entrepreneurial activities is difficult enough in an ordinary antitrust case. It becomes vastly more difficult when the activities, as well as the principles, are far removed from the everyday experience of the jurors. As the jury foreman said ruefully after 19 days of fruitless deliberations, "If you could find a jury that's both a computer technician, a lawyer, an economist, knows all about all that stuff, yes, I think you could have a qualified jury, but we don't know anything about that." 104 Tr. 19,547-48.

Any one of the dimensions of complexity—technology, finance, economics—might well have been expected to baffle the ordinary juror. Taken together, and in the context of the sheer quantity of the evidence offered (83 witnesses, 2300 exhibits), the combination of these aspects made Memorex's case too complex for the jury to be able to reach informed, reasoned decisions on the issues presented.

THE JURY COULD NOT UNDERSTAND AND ACCURATELY RESOLVE THE QUESTIONS OF ELECTRONIC DATA PROCESSING TECHNOLOGY PRESENTED BY THE PARTIES' EVIDENCE

A principal basis of Memorex's claims was that IBM introduced new products and altered existing products without technological justifications for the changes. Memorex asserted that several "interface" changes associated with new or altered products effectively prevented it from marketing peripheral equipment because it could not "reverse engineer" the new interface in time to compete with IBM products. For each new product or interface change, Memorex contended that the alteration was not justified by a technological advance, better performance, lower cost, or other legitimate business consideration, and that the new product or interface change placed Memorex at a competitive disadvantage. In each case, IBM responded with evidence detailing the engineering reasons for the product changes, the resulting electronic efficiencies and improvements, and the advantages to customers from the changes.

The introduction of the "new attachment strategy" provides an example of the kinds of technical issues that the jury was supposed to resolve. *See* 458 F. Supp. at 440-41. As described by Memorex, this policy of IBM included splitting a 3830 disk drive control unit, shipped in 1971, into two parts—a "Blivet," which was made into an "A" Box with two disk drives, and a Director—and then, in 1972, marketing the different packages with different prices. *See* Memorex Br., p. 69; 92 Tr. 18,609-10. Memorex contended that the IBM strategy had no engineering justification, increased IBM's manufacturing costs substantially, and was undertaken only to create an artificial interface designed to exclude Memorex from the market for control units. *See* Memorex Br., pp. 69-72; 92 Tr. 18,622-24. IBM contended that dividing the functions of the existing control unit between the two units

benefited customers in a variety of ways and was preferable to an alternative attachment strategy urged upon the jury by Memorex's expert. 458 F. Supp. at 440-41.

Thus, the jury was asked to formulate a series of judgments about whether IBM was meeting competition in the electronic data processing industry "technologically with new or improved products" or whether IBM was making product changes "with no technological justification, but solely for anticompetitive reasons." [2] Memorex Br., pp. 16, 17. And these questions were to be decided by eleven lay persons, only one of whom "had even limited technical education," 458 F. Supp. at 448, and none of whom had any substantial college-level training.

THE JURY COULD NOT UNDERSTAND AND ACCURATELY RESOLVE THE FINANCIAL ISSUES RAISED BY MEMOREX'S CLAIMS

In addition to challenging technological innovations by IBM, Memorex pressed other contentions that required an understanding and application of sophisticated corporate financial and accounting concepts. Memorex's attacks on the prices of several new IBM products and on its Fixed Term Plan, together with IBM's evidence rebutting these claims, necessarily called upon the jury to master and apply such recondite notions as marginal or average variable cost, short-run profit-maximizing price, fully allocated cost, "price balancing," rate of return, cash flow, debt and equity financing, and numerous other financial and accounting concepts.

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[2] The phrasing of the relevant portion of the jury instruction was as follows:

> Only designs which have little engineering justification and which can serve little useful purpose except to exclude competition can be deemed anticompetitive conduct.

Jury Instruction No. 56.

Memorex's claims as to "IBM's discrimination among its customers, its sacrifice of short-run profits and concurrent price balancing," Memorex Br., p. 18, carried the jurors into the intricacies of corporate financial analysis. The jurors were expected to understand—and approve or disapprove—the ways a computer manufacturer sets prices and projects revenues and profits and the ways it allocates costs and income to different products. They were expected to understand the EDP industry and the techniques of financial analysis well enough to determine the reasonableness of IBM's projections of revenues from particular products offered at particular prices or the propriety of IBM's practices in allocating overhead costs among different products. *See, e.g.*, Memorex Br., pp. 61 n.38, 80 n.43.

In addition to resolving specific financial and accounting issues, the jury was asked to reach judgments on such larger questions as the nature and consequences of the "risk lease environment" said to exist in most of the markets alleged by Memorex. *See* Memorex Br., pp. 127-28. Despite the efforts of counsel, there is reason to believe that the jury was not comfortable in assessing the parties' contentions as to the alleged risk-leasing environment and its competitive consequences. During the court's colloquy with the jurors after a mistrial had been declared, one juror offered the following analysis:

> The Court: What did you think of the Independent Leasing Company [Memorex's leasing affiliate]?
>
> [Juror]: You mean that ILC?
>
> The Court: Yes, ILC.
>
> [Juror]: Well, I thought, in that industry, which goes not like that, it goes like that, is plenty enough work there for more companies, you know, every-

> body can live and eat, and I think, did think it was —if it's an industry like that, it—you really don't stay doing one thing, you go with the industry, and I really thought all these, taking away the cash flow, all doing these things, you know, helped them not to get it, to just don't get it.
>
> The Court: Uh-huh. Fine.
>
> [Juror]: But I think it is enough and industry knew going out that there is enough work for more companies to work and get their fruit.

104 Tr. 19,535.

THE JURY COULD NOT UNDERSTAND AND APPLY THE ECONOMIC PRINCIPLES REQUIRED TO ASCERTAIN THE COMPETITIVE EFFECT OF IBM'S BUSINESS CONDUCT

In attempting to prove the elements of its monopolization and attempted monopolization claims, Memorex necessarily relied on numerous difficult economic concepts. Memorex alleged the existence of a "general purpose computer systems" market and several submarkets of peripheral products plug-compatible with IBM systems, and it claimed that IBM had power to control price or exclude competition in each of the markets and submarkets. Proof of these markets necessarily involved concepts of product interchangeability, including cross-elasticity of demand and supply, market share, and barriers to entry. *See* Jury Instructions Nos. 34-41. The assessment of market power *vel non* required balanced judgments about the competitive significance of changes in market share, entry of new competitors, exit of existing firms, sources and rates of product innovation, adoption of particular pricing strategies, the existence and import of "product differentiation," and a variety of other structural and behavioral features of the alleged markets and submarkets. *See* Jury Instructions Nos. 42-45.

Decisions on such economic issues required expertise well beyond the abilities of the jury. For example, to define the boundaries of a market for general purpose computer systems or for disk drives, the jurors would have had to understand, not only the economic concept of a "market," but also the information processing functions such systems or drives performed, the multitude of available options for performing these functions, and the price/performance ratios of those alternatives. Only with such information in hand could the jury rationally begin to determine whether other products, such as minicomputers or tape drives, exhibited a degree of substitutability in use, or production, sufficient to warrant, as a matter of sound economic judgment, their inclusion or exclusion from the markets claimed by Memorex.

Similar difficulties arose out of every element of Memorex's antitrust claims. To measure market share, for example, the jury needed to decide whether to consider installed base or current output; storage capacity (that is, megabytes) or the number of spindles; and spindles owned by leasing companies or only those owned by the manufacturer. *Compare* Memorex Br., pp. 129-30, *with* 95A Tr. 19,173-77. To assess barriers to entry, the jury needed to decide what weight should be given to the "risk lease environment," to product differentiation, to economies of scale, and to "software lock-in." *See* Memorex Br., pp. 127-29.

To decide competently Memorex's case against IBM, as Memorex itself observed, "[t]he jury must consider all of the evidence in the case, without compartmentalizing it . . . ." Memorex Br., p. 23. Because the subject of the case was competition and monopolization and because the relevant facts were technological, financial, and economic matters entirely foreign to the everyday experience of ordinary jurors, the five-month trial only overloaded the Memorex jury with more perplexing data than they

could possibly order into an accurate picture of competitive reality.

THE JURY DEMONSTRATED THAT IT DID NOT UNDERSTAND THE CASE

The jury that heard the Memorex case, though "conscientious and diligent," 458 F. Supp. at 447, and probably a random cross-section of people in the community who could take the inordinate amount of time to serve on that jury, *id.* at 448, did not understand the issues. The judge found that it did not. After observing the jurors throughout the trial, after listening to the same evidence, and after questioning the jurors about some of the aspects of the case, he concluded that the jury had trouble grasping the concepts discussed by the expert witnesses and that it was unprepared to decide the case. *Id.* at 447.

The jurors themselves agreed and demonstrated that they did not understand the case. They made this clear when, after many days of deliberations, they responded to the judge's questions during a break. For example, the foreman thought he had "missed cross-elasticity." 101 Tr. 19,489. Another said he "would like to kind of look into" demand substitutability, and a third said of barriers to entry that she "would have to read about it." *Id.* at 19,490. One juror, explaining an interface, said: "[I]f you take a Blivet, turn it off one thing and drop it down, it's an interface change . . . ." *Id.* at 19,491; *see also* 104 Tr. 19,527-42. Another juror thought that reverse engineering was "when you would take a product . . . reverse its function and use it in your own method." 101 Tr. 19,490.

After the judge declared a mistrial, he asked the jurors whether they would want a jury to determine a case of this type if they were one of the parties. A majority of the jurors said that judges should hear and decide these

cases without juries, and several of the jurors added that none of them completely understood the case. 104 Tr. 19,547-52. The judge's inquiries as to why some of the jurors had voted as they did elicited further evidence of the jurors' inability to make rational decisions concerning the issues in the case. One juror explained her "decision" for Memorex in the following terms:

> The Court: . . . [W]hat was your thinking in the case?
>
> [Juror]: Oh, I think they tried to monopolize them quite a bit.
>
> The Court: Why? In what way?
>
> [Juror]: Well, I just couldn't say right now.
>
> The Court: You have no idea on how they monopolized them?
>
> ([Juror] shakes head negatively.)

104 Tr. 19,528 [3]

[3] After the trial, some of the jurors, in affidavits obtained by Memorex, asserted that they understood the facts and issues in the case. The affiants describe in general terms the outline of the trial, the names of some witnesses, or some of the phrases used repeatedly during the trial. (Many of the affidavits use the same phases and terminology, suggesting that they were generated under the close supervision of Memorex. *Compare* Declaration of Albert Bratovich, CR 2036-38, *with* Declaration of Fay McKay, CR 2054-58.) Understanding the case, and providing the parties with a reasoned decision, would obviously have involved a far more demanding intellectual effort than any displayed in the affidavits.

APPENDIX B

Wall Street Journal, February 26, 1980, at 18, col. 3 (Eastern ed.)

AT&T JURORS FIND A LITTLE KNOWLEDGE IS A DIFFICULT THING

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Comprehension Comes Hard, If at All, in Such Trials Presenting Complex Issues

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By David J. Blum

CHICAGO—Most Americans couldn't care less about how a telephone works—as long as they hear a dial tone when they pick up the receiver.

But for 12 jurors here, learning the intricacies of the instrument and the industry has become a daily task. They are struggling with a complex case that promises to have sweeping effects on American business. After three weeks of hearing testimony, they look tired and confused.

The case is the first in a group of nearly 50 antitrust suits brought against American Telephone & Telegraph Co. It is expected to preview important issues and evidence of later trials, including a major one next fall brought by the Justice Department.

The basic facts are understandable enough. MCI Communications Corp., a small, Washington, D.C.-based telephone service, charges that AT&T kept it from entering the private-line long-distance telephone market, and asks for $900 million in damages.

But then the case becomes difficult. Indeed, George Saunders Jr., chief defense attorney for AT&T, calls the case "the most complicated in American legal history." And the lawyers, judge and witnesses frequently prove his point. They speak to the seemingly befuddled jury in acronyms and jargon familiar to insiders in the telecommunications industry, a language the jurors have only begun to learn.

How's That Again?

In the first day of testimony, one witness was asked: "Did MCI's concern over the price of interconnections for FX and CCSA, multipoint or service outside of the LDA, have anything to do with MCI's inability to lease those interconnections from AT&T?"

Replied the witness, "We never got to the point of even discussing price."

Interchanges like that lead legal experts to question whether juries can reach fair decisions in highly technical civil trials such as this one. "It's hard to believe that any sensible person thinks that some of these complex decisions can be made by a layman," says Phillip Areeda, a law professor at Harvard University. "The notion that they can sit here for months, remember everything and work it out like a judge just isn't true."

At the MCI trial, "the jurors don't really know what's going on," says Mr. Saunders, the AT&T lawyer. But, he says, "It's our hope that eventually they'll get the essence of it." MCI's lawyer, Robert Hanley, says the jurors "don't always follow along."

Federal Judge John Grady has recognized the jurors' problem by allowing them to take notes during the testimony—an unusual departure from court practice. And MCI has furnished each juror with a looseleaf notebook

with blank pages and a glossary of technical terms. AT&T disagrees with some of the MCI definitions, however, and says it plans to offer different ones as part of its defense.

Autodin vs. Autovon

On a recent morning, the words "autodin" and "autovon" came up in the cross-examination of a witness. Jurors searched their notebooks in vain for definitions and finally had to rely on the testimony of one witness who offered this explanation of the terms:

"There are two large switched services that the government uses internally. One is a CCSA network, using private lines connecting switches for voices, and that is called 'autovon.' Then there is another service, which I believe most of it is provided by Western Union, using AT&T circuits extensively, for record communication which is typically teletypewriter to teletypewriter as contrasted to voice to voice or ear to voice, and it is to supply record communication to the military side of government use."

Lawyers for both sides say the jury is "very smart" and Mr. Hanley notes that "some have advanced degrees." But in fact, only two have such degrees, both in library science. One other juror is a college graduate who works as a substitute teacher.

Most of the jurors hold relatively unskilled jobs. They include a mail handler for the Postal Service, a research engineer, a former waitress and secretary, a municipal garbage burner, an electrical equipment operator, a deputy county assessor, an unemployed construction worker and a retired kitchen saleswoman.

But trial by jury in cases such as these is a constitutional right. "It is the beauty and evil of a jury that it

can give justice in spite of the law," says Jack Friedenthal, professor of law at Stanford University.

Well, sometimes. In an antitrust suit brought by Memorex Corp. against International Business Machines Corp., IBM won a directed verdict by the judge in 1978 after the jury had voted, nine-to-two, in favor of Memorex. Federal judge Samuel Conti denied Memorex's request to have the case retried by a jury after interviewing the jurors and deciding that they hadn't understood the case.